Desert Construction, Inc. *and* Robert William Northcutt. Case 28–CA–10361

September 22,1992

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND OVIATT

On March 20, 1992, Administrative Law Judge Gordon J. Myatt issued the attached decision. The General Counsel filed exceptions and a supporting brief and the Respondent filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order.

We agree with the judge that the Respondent did not violate Section 8(a)(1) of the Act by discharging employee Northcutt. In adopting the judge's conclusion, we find that the General Counsel failed to establish a prima facie case that Northcutt's protected activity was a motivating factor in the Respondent's action. The General Counsel argues in his exceptions that Northcutt's discharge shortly after his assertion of what he believed to be a contract right demonstrates that this protected activity prompted the action against him. We agree with the judge, however, that Harmon, the Respondent's president, did not decide to discharge Northcutt when he was informed of that matter, but rather subsequently when he was told about Northcutt's continuing performance and attitude problems. We also note that, prior to Northcutt's engaging in protected activity, he had been selected for layoff because he was identified as one of the Respondent's weakest employees and that the layoff was not alleged to be unlawful.

At the hearing, the General Counsel also relied on statements made by Harmon to Northcutt following his discharge as indicative of unlawful motivation. According to Harmon's credited version of the incident, Northcutt returned to the office complaining that his paycheck did not include the pay differential for performing jackhammer work. After Harmon handed Northcutt a $20 bill to cover the differential, Northcutt continued to argue. Harmon became angry and told Northcutt to get out. He further stated that he had been abiding by the union contract for over 30 years, was still a dues-paying member, and did not need anyone to tell him how to run a business or comply with the contract. He again asked Northcutt to leave and went back into his office. We find that these remarks, when viewed in the larger context of this case, are insufficient to support an inference that Harmon's earlier decison to terminate Northcutt was motivated by his assertion of a perceived contract right.

Further, even assuming that the General Counsel has established a prima facie case of improper motivation, we find that the Respondent has demonstrated that it would have discharged Northcutt in the absence of his protected activity. As the judge found, Northcutt was not a satisfactory employee. He took longer than required to complete his duties, failed to follow instructions, and his coworkers complained about working with him because of his constant complaining and negative attitude. Before his layoff, he had received four oral reprimands for standing around idly at jobsites and work rule infractions. The judge also found that Duran, the general superintendent, refrained from terminating Northcutt earlier only because he was aware of Northcutt's social relationship with Mayorga, who, as the former general superintendent, had hired Northcutt and who by the time of the discharge held the second highest position in the Respondent's organization. When he allowed Northcutt to return to work from the layoff, Mayorga told the employee that his performance and attitude would have to improve, but Northcutt's work problems continued. Under these circumstances, we conclude that the Respondent has effectively rebutted any prima facie case of unlawful motivation in its decision to discharge Northcutt.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.[2]

[1] The General Counsel has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

Cornele Overstreet, Esq., for the General Counsel.
Dennis E. Simmons, Esq. (Simmons, Madson & Snyder), of Las Vegas, Nevada, for the Respondent.

DECISION

STATEMENT OF THE CASE

GORDON J. MYATT, Administrative Law Judge. On a charge filed by Robert William Northcutt, an individual, against Desert Construction Inc., the Regional Director for Region 28 issued a complaint and notice of hearing on July 18, 1990.[1] The complaint alleges that Respondent discharged Northcutt on May 4 because the employee asserted a claim for payment of wages for work performed at one of Re-

[1] All dates herein refer to the year 1990 unless otherwise indicated.

spondent's jobsites. It is alleged that this conduct violated Section 8(a)(1) of the National Labor Relations Act (the Act). Respondent filed an Answer in which it admitted certain allegation of the complaint, denied others, and specifically denied committing any unfair labor practices.

A hearing was held in this matter on October 16 and 17 in Las Vegas, Nevada. All parties were represented by counsel and afforded full opportunity to examine and cross-examine witnesses and to present material and relevant evidence on the issue. Briefs were submitted by the parties and have been duly considered.

On the entire record in this matter, including my observation of the witnesses, and upon consideration of the briefs, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent is a Nevada corporation engaged in the building and construction industry as an underground electrical contractor. Respondent maintains an office and its principal place of business in Las Vegas, Nevada. During the 12-month period preceding the issuance the complaint, Respondent purchased and received goods and materials valued in excess of $50,000 directly from suppliers located outside the State of Nevada. Accordingly, I find the Respondent is, and has been at all times material, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

Laborers' International Union of North America, Local Union No. 872, AFL–CIO (the Union) is a labor organization within the meaning of Section 2(5) of Act.

A. *Northcutt's Hiring and Job Duties*

The Charging Party (Northcutt) began his employment with the Respondent on January 3, 1989. He was hired by Tony Mayorga, Respondent's then general superintendent. The undisputed testimony indicates that Northcutt became personally acquainted with Mayorga through the latter's mother, who was the girlfriend of Northcutt's father-in-law. As a result of this relationship, Northcutt assisted Mayorga in performing some construction work on Mayorga's home and Mayorga offered to get Northcutt a job with Respondent.[2]

Northcutt was employed by the Respondent as a laborer. Respondent's employees were classified as laborers, operators and electricians, and each category of employees was represented by a union whose members worked in that particular trade. Northcutt testified that sometime in May 1989, Mayorga assigned him to operate a backhoe on a job. According to Northcutt, he was told by Mayorga that if he learned the skills of operating the equipment, Mayorga would see about getting Northcutt into the Operating Engineer's union. Northcutt stated thereafter he operated a backhoe on a daily basis. When confronted with the fact that his timecards did not indicate he operated a backhoe on a daily basis, Northcutt acknowledged that he did not do so. Nevertheless, he insisted that he operated the equipment on ''numerous occasions.''

Mayorga's testimony indicated that after he hired Northcutt, he did assign the employee to operate a backhoe at jobsites on occasion while he was the general superintendent.[3] According to Mayorga, he did so because the Northcutt possessed a cass I license which would permit him to drive a drill rig. Mayorga told Northcutt that if he learned all the operator's skills on the equipment, Mayorga would see if Northcutt could get in the Operator Engineers' union. Mayorga further stated he advised Northcutt to practice on the equipment after hours at jobsites or on the weekends. According to Mayorga, Northcutt did neither and failed to demonstrate the skills necessary to operate the equipment productively.

B. *Northcutt's Performance Prior to the Layoff*

Northcutt testified that during the time he was employed by Respondent, he never received a written reprimand concerning his performance on the job. He acknowledged, however, that he was not aware of any other employees receiving written reprimands from management. Northcutt admitted that on one occasion he received an oral reprimand from Mayorga because he and another employee were seen sitting in a truck at a jobsite drinking coffee.

Contrary to Northcutt's testimony, the testimony of Respondent's officials and employees indicate there were numerous complaints about Northcutt's performance and attitude on the job. Harmon, Respondent's owner, testified that on several occasions he observed Northcutt standing around and not working while at a jobsite. Harmon stated he was driving by a jobsite approximately a month after Northcutt was hired and observed the employee standing around doing nothing while others were working. Harmon testified he made it a practice to drive by jobsites during the course of the workday to see how the work was proceeding. According to Harmon, on this occasion Northcutt was still standing around when he passed the jobsite and returned. Harmon stated he first thought Northcutt was a state inspector because the employee was the only one not working. After learning that Northcutt was an employee, Harmon instructed Mayorga to deal with the matter.[4] Harmon further testified he observed Northcutt leaning on a shovel talking to a coworker at a jobsite in front of Ceasar's Place on a subsequent date. Although he could not recall the precise date, Harmon stated it was shortly before the opening of the Mirage Casino. Again, according to Harmon, he instructed the superintendent to speak to the employee.

Mayorga testified that he spoke to Northcutt about his performance on the job on several occasions after receiving instructions from Harmon to do so. Mayorga confirmed that he reprimanded Northcutt and employee Coleman for standing and talking for approximately 20 minutes in front of Ceasar's Place. He also spoke to the same employees about sitting in

[2] When Northcutt was hired, Mayorga made a specific request at the union hall that Northcutt be dispatched to the Respondent.

[3] In March 1989, Mayorga was promoted to the position of estimator for the Respondent. As such, he became the second highest official in terms of managerial authority. Dan Duran was hired to succeed Mayorga as general superintendent at that time.

[4] The unrefuted testimony indicates that Harmon never spoke directly to employees at the jobsites about their work. He would observe and then relay instructions to the superintendent to take corrective action.

the truck drinking coffee while at a jobsite. Mayorga further testified that he observed Northcutt and another employee riding in a truck together ''scoping'' (apparently making a visual inspection) a jobsite. Mayorga stated he reprimanded the employees as it was not necessary for two employees to perform this task. Mayorga also stated that after he became the estimator, Duran reported to him that other employees were dissatisfied working with Northcutt. They objected to Northcutt's constant complaints and negative attitude about the work.

Duran, described by Harmon and Mayorga as being ''easy going,'' stated that when he became the general superintendent, he knew that Northcutt had been initially hired by Mayorga and he observed that Mayorga displayed favoritism toward Northcutt. According to Duran, Northcutt was argumentative, failed to follow instructions, took longer than other employees to complete his tasks, and was always complaining. Duran stated that he would have discharged Northcutt because of his attitude and poor job performance, but did not do so because of the personal relationship between Mayorga and Northcutt. Instead, he reported his observations and complaints about the employee directly to Mayorga, since he felt that it was a matter to be handled by Mayorga.

Raymond Duran, brother of the general superintendent, worked as laborer for Respondent. He testified that while he usually worked by himself on jobsite, he had occasion to work with Northcutt on three or four jobs. According to R. Duran, Northcutt was constantly complaining and was ''miserable about his work.'' Placido Hernandez, currently an operator but initially hired as a laborer, testified that when he had occasion to work with Northcutt on jobs, Northcutt would constantly complain about the work and was critical about most of the equipment used by the Respondent.

C. *The Layoff on April 20, 1990*

In April 1990, Respondent's volume of jobs began to slow down and management made a decision to layoff some employees. Mayorga stated that in meetings with Harmon and Duran, they decided to lay off employees who were the least productive or who were ''problem employees.'' Duran recommended that Northcutt be one of the employees laid off because of his poor attitude and job performance. Mayorga agreed as he considered Northcutt to be one of the ''weakest links.'' According to Northcutt, Duran notified him and another laborer (Coleman) on April 19 at a jobsite that the two employees would be laid off at the end of work the following day. Duran told Northcutt that work was slow and he did not know how long the layoff would last. Duran advised the employees that the layoff could be ''a week or longer.'' The next day after work, Mayorga spoke to Northcutt in his office in order to further explain the layoff to the employee.

The undisputed testimony indicates that Mayorga told Northcutt that he was selected for layoff because he was becoming a problem to Duran and his coworkers on the jobs. Mayorga also advised the employee that Harmon had observed him loafing on jobs. Mayorga told Northcutt that he had a bad attitude and he would have to ''shape up or ship out.'' Mayorga further informed Northcutt that the layoff would be for a week or two.

Northcutt testified that he did not receive a layoff slip, which he stated was necessary to permit him to register at the union hall, nor did he receive a check for work performed after the end of Respondent's payroll period.[5] Northcutt spoke to Harmon who advised that he would get back to the employee, but failed to do so. Northcutt called the union office and spoke to a representative. According to Northcutt, he was advised that he was not officially laid off under the contract because he had not been given a layoff slip. He stated he was told to report to work as usual the following Monday.

On April 23 (Monday), Northcutt appeared at Respondent's facility at 6 a.m. Duran questioned why the employee was there and Northcutt stated he was there to get his full wages and a layoff slip. He also asked if he were going to receive showup time for that day, since he was not officially laid off until he received a slip to that effect. Northcutt was advised that he would have to wait until 9 a.m. to permit the office staff to issue the layoff check and have it signed by Harmon. Northcutt stated he left and went to the union hall where he spoke with Kenneth Smith, business manager of the Union. Smith stated, according to Northcutt, that he would call Respondent and instruct them to give the employee 2 hours showup time plus an hour for having to wait until 9 a.m. to receive his check and layoff slip. Northcutt stated he received his check and layoff slip at approximately 11 a.m. It included 2 hours of showup time and an additional hour's wages. The layoff slip was dated April 23, although the layoff was the preceding Friday. It indicated that Northcutt was laid off as a result of a ''reduction in force.'' (G.C. Exh. 4.)

Harmon acknowledged that Northcutt had returned to the facility the Monday after the layoff. He stated the payroll clerk placed a check for Northcutt on his desk and he merely signed off on it. Harmon denied having a conversation that morning with any representative from the Union about Northcutt's showup time or the failure to give the employee a layoff slip.

Smith, the union business manager, was called as a witness. He also denied having any conversation with Northcutt at the union hall about the layoff. Smith stated he became aware of the layoff at Respondent's facility that preceding Friday when he was advised by a business representative (Duckworth) that there were problems regarding the layoff. Smith denied he advised Northcutt that the layoff was not official because the employee was not given a layoff slip at the time. Smith further testified that it was the practice in the industry to give employees either verbal or written notification of layoffs. Smith stated the contract did not require a layoff slip, and he would not have told Northcutt to report to work in the absence of receiving one.

The following Sunday, Northcutt telephoned Mayorga at home to inquire about when the layoff would end. According to the testimony of Northcutt, Mayorga stated he had heard that Northcutt and Coleman were going to sue Respondent because of the layoff. Northcutt denied any such intentions. He stated that Mayorga then instructed him to report to work the next morning.

While Mayorga acknowledged he had a telephone conversation with Northcutt on Sunday, he denied asking the

[5] The payroll period ended at the completion of the workday on Tuesdays. Since the layoff occurred on a Friday, Northcutt was seeking his wages for the balance of that workweek.

employee whether he intended suing Respondent. According to Mayorga, he decided to give Northcutt another chance to work, hoping that the employee would ''straighten up.'' Mayorga stated he told Northcutt that when the employee returned to work the next day, his attitude and job performance had to improve. Mayorga further testified he recalled Northcutt out of sympathy and did not discuss the matter in advance with Harmon or Duran.

Harmon testified that he was not pleased with Mayorga's decision to recall Northcutt. Harmon stated he reprimanded Mayorga because Respondent did not need to recall any of the laid-off employees at that time. Duran also voiced his displeasure over the recall of Northcutt to Mayorga. According to Duran, Mayorga said that Northcutt was instructed to ''straighten up or be let go.''

D. *The Events Leading to Northcutt's Discharge*

Northcutt testified that when he returned to work on April 30, he was assigned to a jobsite at Spring Valley and Mountainview.[6] He stated that he was performing laborer's work. Sometime during the week, according to Northcutt, both Duran and Mayorga questioned his use of a particular dumptruck as opposed to using another truck for the same purpose. When Northcutt stated the other truck was unsafe, he was informed that it had been repaired.

On the morning of May 4, when Northcutt reported to work, he had in his possession a photocopy of a section of the collective-bargaining agreement that related to the payment of employees' wages. (G.C. Exh. 6, art. XIII, sec. 4,B.) The undisputed testimony indicates that Northcutt was discussing the provision with a coworker (Meegan) in the yard prior to leaving for a jobsite. Duran observed them and enquired whether they were talking about something that he should know. Northcutt replied no and the employees left for their job assignment.

Northcutt testified he and Meegan were working at a jobsite with an operator and went to a nearby 7-Eleven store for lunch. Northcutt stated that Duran came to the 7-Eleven looking for the employees and he showed Duran the copy of the contract provision. Northcutt interpreted this provision to require the Respondent to give the employees their paychecks directly at the jobsite one-half hour before quitting time. Northcutt asked Duran if the employees were going to receive their checks at the jobsite that afternoon.[7] Duran promised to look into the matter and instructed Northcutt to work with another laborer and an operator who were assigned to install crossings. Northcutt further testified that Duran later returned to where Northcutt was working and took him to another jobsite where Duran instructed him to install a ''loop pocket.''

According to the testimony of Northcutt, he was picked up by an operator in one of Respondent's trucks at quitting time and driven to the shop. There, Harmon met him and stated, ''Here's your checks, you are paid up. Don't fill out a timecard.'' Northcutt further stated that Harmon said he had been in the union for 30 years and did not need anyone telling him what the union rules were. Northcutt complained that his check did not contain the pay rate he should have received for performing jackhammer work the prior Monday and Tuesday.[8] Northcutt said Harmon then called him stupid for not putting the job category on his timecard. According to Northcutt, Harmon handed him a $10 bill and said, ''Fuck you, here's $10. Get the fuck out of here and I don't want to see your fucking face again.''

The testimony of Respondent's witnesses concerning the discharge differed from that of Northcutt in several material respects. Duran stated that on May 4, he assigned Northcutt to install a loop pocket at a site. According to Duran, this should have taken no more than 3 hours to complete. When he drove by the site he failed to see Northcutt, nor did he see the other employees assigned to a nearby jobsite. Duran then went to a 7-Eleven in the area where he discovered the employees. There, Northcutt presented Duran with the copy of the contract provision and said his paycheck should be at the jobsite 1 hour before quitting time. Duran stated he told the employee that he would try to get the paycheck to the jobsite. He instructed Northcutt to assist the operator and Meegan in laying conduit at the nearby site and then return to his original jobsite and complete the installation of the loop pocket.

Duran called the office to inquire about the paychecks and was told they had not been signed because Harmon had not yet returned from his trip to Laughlin. Shortly thereafter, Duran received a call from Harmon on the cellular phone asking about the problem with the paychecks. According to Duran, when he explained the Northcutt was insisting the contract required the employees receive their paychecks at the jobsite, Harmon stated Northcutt was misinterpreting the provision. Harmon said the requirement only applied to employees who reported directly to jobsites for work rather than to employees who reported to the shop and were driven to and from the jobsites in company vehicles. Harmon told Duran there was no problem and that he would arrive at the shop in time for the employees to receive their paychecks as usual.

After Harmon assured Duran there was no need to be concerned about the matter of the paychecks, Duran began to voice his complaints about Northcutt's performance and attitude. He stated he did not know what to next expect from Northcutt. He mentioned that Northcutt was always complaining about the work or the conditions. Also that the employee had not completed the job to which he had been as-

[6] While all of the jobsites were listed by geographical location, they were also designated by job numbers on Respondent's records. A list of current jobsites was kept posted by the timeclock to enable the employees to indicate on their timecards where they had worked during the day.

Duran testified Northcutt was assigned to work at a jobsite on W. Charleston that day. Respondent's records indicate Northcutt worked at W. Charleston (#201) and Valley View (#212). R. Exh. 1(a).

[7] Northcutt admitted that prior to this occasion, the employees had always been paid on Friday afternoons when they returned to Respondent's facility from their respective jobsites. He stated he brought up the matter of the paychecks at this time because he was still doing laborer's work and Mayorga had not followed through on the promise to get him in the Operating Engineers' union.

[8] The contract required different pay scales for various types of work performed by the laborer employees. For example, jackhammer rates were 20 cents an hour more than the basic laborer's rate. Although Northcutt's timecard showed he only performed jackhammer work for 1-1/2 hours on April 30, he asserted that he was entitled to the higher rate for the full workday on the days he used the jackhammer. In this instance, the amount he was claiming totaled $3.20.

signed that morning, even though he had been working at the site long enough to have finished it. Harmon responded by saying, ''We can not live with this.'' Harmon then told Duran that he would not have to be concerned about Northcutt any longer. Harmon instructed Duran to bring Northcutt to the office at quitting time and said he would give the employee his final paycheck and terminate him.

Harmon testified that he had been in Laughlin since the prior Tuesday on business and was returning in his camper when he received word from his office on the cellular phone of problem about the paychecks. Harmon stated he called Duran while in route and was told the particulars of the matter. He stated that when Duran then complained Northcutt's poor attitude and work performance, he instructed the supervisor to bring Northcutt to the office and he would terminate the employee.

Harmon further testified that after he terminated Northcutt that afternoon, the employee returned to shop and complained about not receiving pay for performing jackhammer work. Harmon stated he took out his wallet to search for a $10 bill but discovered he did not have one. He then gave Northcutt a $20 bill to settle the pay differential, but the employee continued to argue. Harmon acknowledged he then became angry and told the employee to get out. He stated he told Northcutt that he had been abiding by the union contract for over 30 years and was still a dues-paying member. Further, that he did not need anyone to tell him how to run a business or how to comply with the union contract. Harmon testified he swore at Northcutt and told the employee to ''hit the frigging road.''

Rodney Briggs, an estimator for another company that shared the same office space with the Respondent, testified that he overheard Harmon talking in an angry voice in the shop on May 4. According to Briggs, it was unusual for Harmon to display anger in the shop. Briggs left the office area and went down the stairs to the shop, when he observed Harmon give Northcutt a $20 bill. Briggs testified he was approximately 20 feet from them at the time. Briggs also testified he was familiar with the problems Respondent was experiencing with Northcutt because his desk was located next to Mayorga's in the office. He stated that during that past week, Mayorga confided in him that Mayorga regretted having recalled Northcutt and that the employee was not ''working out.''

Concluding Findings

The General Counsel contends that Northcutt was discharged for engaging in protected activity when the employee attempted to assert a right under the collective-bargaining agreement between the Respondent and the Union. Further, the fact that Northcutt was mistaken about the application of the contract provision to his circumstances was irrelevant and did not remove him from the Act's protection, since he was ''honest and reasonable'' in the assertion of his belief that the wage provision applied to the Respondent's employees. (Citing *NLRB v. City Disposal Systems*, 465 U.S. 822 (1984).) Thus, under the Board's *Wright Line*[9] doctrine, the General counsel contends a prima facie case has been established showing that Northcutt was discharged for engaging in protected activity, and Respondent has failed to demonstrate that the employee would have been discharged even in the absence of the protected conduct.

Among other things, Respondent argues that the facts fail to make a prima facie showing that Northcutt was discharged for because he invoked the contract provision regarding payment of wage at the jobsite. In essence, Respondent argues that Northcutt was terminated for unsatisfactory job performance and constantly expressing a negative attitude about his work. Further, that had it not been for the employee's special relationship with Mayorga, he would have been terminated much sooner by his immediate supervisor (Duran).

Before turning to the ultimate question presented here, it is necessary to resolve the material differences that exist in the testimony of Northcutt and the witnesses for the Respondent. Having observed all of the witnesses and having taken into account the evidence contained in the record, I find that the testimony of Northcutt is not trustworthy unless corroborated by other witnesses or supported by independent record evidence. Northcutt displayed a marked tendency to distort and exaggerate in his statements and, in some instances, make up events out of whole cloth.

For example, Northcutt stated he went to the union hall and spoke to Smith about receiving showup time the Monday following the layoff, but Smith denied seeing or talking at all to the employee. Another example of Northcutt's willingness to distort his testimony is reflected in his statement that he operated a backhoe on a daily basis. When confronted with the fact that his timecards failed to indicate he regularly performed this task, he changed his testimony to indicate he did so on ''numerous occasions.'' Finally, Northcutt testified that he had only received one oral reprimand during the course of his employment, but the testimony of Harmon and Mayorga, which I credit, indicates he was orally reprimanded on four different occasions: two as a result of Harmon observing him standing around at jobsites; and two as a result of Mayorga observing him commit infractions of Respondent's work rules. Accordingly, I find that Northcutt was not a credible witness and I reject his testimony where it conflicts with the testimony of other witnesses or is unsupported by other evidence in the record.

On the basis of the credited testimony, I find the record clearly establishes that Northcutt was indeed an unsatisfactory and disgruntled employee. He took longer than required to complete his job assignments. He constantly complained about the work and the conditions under which he had work; to such an extent that his fellow employees complained to their supervisors about working with him. Contrary to the arguments of the General Counsel, I do not find that Respondent condoned Northcutt's poor performance and attitude. Rather, I credit the testimony of Harmon that since Mayorga hired Northcutt and there was a personal relationship between them, he was waiting, within reasonable limits, for Mayorga to resolve the problem. I also find that Duran would have discharged Northcutt long before the employee was actually terminated by Harmon, but did not do so because of the relationship between Mayorga and Northcutt, In these circumstances, I do not find that Respondent's management approved, sanctioned or overlooked Northcutt's failures as an employee in the plain sense of the meaning of the term ''condone.'' Rather, I find Respondent's top management official and its first line supervisor were refraining from taking

[9] *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

action against Northcutt in order to permit Mayorga to come to grips with realization that Northcutt was an undesirable employee who should be terminated.

Turning to the question of whether Northcutt's discharge violated the Act under these circumstances, I conclude that it did not. In this regard, I find the General Counsel's application of the Board's *Wright Line* analysis to be flawed. It is evident that the *Wright Line* issue here is not one of pretext, but one involving dual motivation. Therefore, the initial question that must be answered is whether the General Counsel has established a prima facie case which shifts the burden to the Respondent to persuasively demonstrate it would have discharged the employee even in the absence of the protected conduct. The General Counsel appears to contend that his evidence must be viewed in isolation, without regard for other reasons asserted by Respondent for the discharge, in determining whether he established a prima facie case showing that the protected conduct was a motivating factor in the discharge. Since the invocation of the wage provision by Northcutt was the genesis of the phone conversation in which Harmon made the decision to fire the employee, the General Counsel argues that a prima facie case has been established under *Wright Line.*

In my judgment, this analysis involves a far too constrained view of the facts. As the Court of Appeals for the Second Circuit stated in a recent case involving this very question, ''[I]f the employer elects to offer evidence rebutting the General Counsel's prima facie case (whether or not framed as an affirmative defense), the ALJ is entitled to assess the entire record in determining whether the prima facie case remains proven.'' *Holo-Krome Co. v. NLRB*, 954 F.2d 108 (2d Cir. 1992). (On the Board's petition for rehearing. Petition denied.)

While the facts here establish there was only a single phone conversation between Harmon and Duran, it is clear the conversation dealt with two separate events. Duran first explained about Northcutt's interpretation of the wage provision and his demand for receipt of his paycheck at the jobsite. When Harmon said the employee was mistaken about the provision and that he would arrive at the shop in time for the employees to be paid, there was no indication at that point that a decision was made to fire Northcutt. It was not until Duran then went on to complain about Northcutt's poor job performance and attitude that Harmon decided Respondent ''could no longer put up with the employee. This confluence of events resulting in the decision to discharge Northcutt, viewed in the context of the employee's known history for poor work performance and negative attitude about his job, causes me to conclude that the General Counsel has failed to establish a prima facie case demonstrating that Northcutt's protected activity was a motivating factor in the discharge decision.

Accordingly, I find the General Counsel has failed to establish by a preponderance of the creditable evidence in the record that Northcutt was discharged for reasons that violate the Act.

CONCLUSIONS OF LAW

1. The Respondent, Desert Construction, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union, Laborer's International Union of North America, Local Union No. 872, AFL–CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent did not engage in conduct which violated Section 8(a)(1) of the Act when its owner discharged employee Robert Northcutt on May 4, 1990.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[10]

ORDER

The complaint herein is dismissed in its entirety.

[10] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.